

July 3. 1759.

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Unto the Right Honourable, The Lords of Council and Session,

THE
PETITION

OF

MARGARET MATHIE Relict of William Taylor Mariner in Greenock,

Humbly sheweth,

THAT two Adjudications were led against a Tenement in *Greenock*, belonging to *Alexander Taylor* Father to the said *William Taylor*; one in the Year 1709, at the Instance of *Lillias Morison*, for the accumulate Sum of *L. 387. Scots*, upon which she obtained a Charter from the Superior, and was infest, in the Year 1713; and the other at the Instance of *Magdalen Bryce* in 1719, for the accumulate Sum of *L. 516. 19. 6. Scots*. 27. Jan. 1709.

That the said *William Taylor* having earned some Money by his Employment, applied it to acquiring these two Diligences, and got Conveyances from the Creditors in the Years 1721 and 1724; and, in virtue of these Titles, he entered into Possession of the Tenement, and continued it during his Father's Life; and, in the Year 1725, he obtained a Declarator of Expiration of the Legal, upon the first Adjudication, which was led in 1709, and had been completed by Infestment. 16. July 1719.

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The Petitioner having afterwards intermarried with the said *William Taylor*, a postnuptial Contract of Marriage was executed betwixt them in 1741, in terms of the Communing past, antecedent to the Marriage, by which he conveyed this and other Subjects to her and himself in conjunct Fee and Liferent, and the Children in Fee. And as she saw her Husband in the undisturbed Possession of this small Tenement, she entertained no Doubt of his Right, but cheerfully paid off her Husband's Debts, and applied the rest of her Substance towards repairing this Tenement which now yields *L. 13. Sterling* of yearly Rent, and is the only Fund she has to rely on for her Subsistence.

That *James M'Neill* Clerk of the Customs at *Greenock*, having served himself Heir to *James M'Neill* his Father, who had adjudged this Tenement in 1726, upon a Bond of 315 Merks with 100 Merks of Penalty and Annualrent, granted by the said deceased *Alexander Taylor*, and another *Alexander Taylor* also Merchant in *Greenock*, has brought a Process of Reduction of the said Adjudications, and insisted specially upon this Ground, That as they were acquired by *William Taylor*, the eldest Son of *Alexander Taylor* the Debtor, they fell under the Sanction of the second Clause of the Act 1695, which declares every such Adjudication to be reputed a Behaviour as Heir; and consequently the Diligences, by coming in his Person, became extinguished *confusione*, and cannot compete with other onerous Creditors of his Father.

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The Lord Minto Ordinary, by Interlocutor of the 19th *January* last, *sustained the Reasons of Reduction upon the Act 1695; and reduced, decerned and declared.* And upon advising a Representation and Answers upon the 26th *June* last, his Lordship *refused the Desire of the Representation, and adhered to his former Interlocutor.*

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The Petitioner must humbly apply to your Lordships for a Review of this Interlocutor, by which she is stripped of her all. And as she believes the Decision is intriely new, she is persuaded it will be thought well to merit the Consideration of the Court. The Ground of Reduction is laid singly upon the second Clause of the Act 1695, which shall be *verbatim* recited. "Statutes and ordains, That if any apparent Heir for hereafter shall, without being lawfully served or entered Heir, either enter to possess his Predecessor's Estate or any Part thereof, or shall purchase, by himself or any other for his Behoof, any Right thereto, or to any legal Diligence or other Right affecting the same, whether redeemable or irredeemable, otherwise than the said Estate is exposed to a lawful public Roup, and as the highest Offerer thereat, without any Collusion; his foresaid Possession or Purchase shall be repute a Behaviour as Heir, and a sufficient passive Title to make him represent his Predecessor universally, and to be liable for all his Debts and Deeds, sicklike as if the said apparent Heir, possessing or purchasing as said is, were lawfully served and entered Heir to his said Predecessor. Declaring always, likeas it is hereby declared, That the said apparent Heir may bring the said Estate to a Roup whether the Estate be bankrupt or not."

If the Words of the Statute are attended to, they appear throughout to apply only to the Case of a proper apparent Heir, entering to possess, or acquiring Debts, after his Predecessor's Death. *Predecessor* and *apparent Heir* are *co-relative* Terms: As it is absurd to call a Man a *Predecessor* while he is alive, so it is improper to design his Son *apparent Heir* during that Period. But here it is unnecessary to recur to the strict Propriety of the Words; for, without the strongest Violence, the Clause will not admit of another Construction. The apparent Heir who comes under

under the Sanction of this Clause is described to be one who has it in his Power to *serve* or *enter* Heir, and who, in place of taking that Method, chuses to *enter to possess* his Predecessor's Estate, and to *purchase legal Diligences* affecting the same. It is impossible to apply any of those Things to a Son during his Father's Life. It cannot be said, that he neglects to *serve* or *enter* Heir; and it would be equally absurd to say, while his Father is alive, that he is possessing his *Predecessor's Estate*.

And the last Part of the Clause confirms the same Import: The *Possession* or *Purchase* is declared to be *reputed a Behaviour as Heir*, and a *sufficient passive Title to make him represent his Predecessor universally*, and to be *liable in all his Debts and Deeds*. A Behaviour as Heir will only apply to one who has it in his Power to enter to a Predecessor who is gone. It would be absurd to speak of representing a Predecessor universally while he is alive, or of being liable in all his Debts and Deeds. What these may be cannot be known until his Decease; and no passive Title was ever devised in the Law to make a Man liable for the future Debts or Deeds of a Person then alive. Here, it is plain, the Statute has no View to introduce such Inconsistency; for it concludes with describing the Manner of the Representation to be the same *as if the apparent Heir, possessing or purchasing as said is, were lawfully served and entered Heir to his said Predecessor*. This supposes him capable of entering Heir at the Time of the Purchase; and then the Purchase so made is declared equivalent to a Service.

And as the Law had allowed but one Method for an apparent Heir to take up his Predecessor's Estate after his Death, *viz.* as the highest Offerer at a public Roup; so it concludes the Clause with declaring, *That the apparent Heir may bring the Estate to a Roup*; which supposes that the Debtor is then deceased; as indeed this is necessarily supposed from
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from every Part of the Clause upon which this Question depends: Every Word of it exhibits the *Debitor* as a Person deceased, and the *Succession* devolved to his *apparent Heir*, who has it in his Option to make up Titles in the direct Manner by Service, but instead of that chuses to take an indirect Way of making up a Title to cover the Possession of the Estate of his Ancestor then deceased.

2^{do}, If the Intention of the Statute is considered, it will appear to support the same Construction. It is set forth in the Preamble: "Our sovereign Lord, considering the frequent Frauds and Disappointments that Creditors do suffer upon the Decease of their Debtors, and through the Contrivance of apparent Heirs, to their Prejudice; For Remedy whereof, &c." The Evil here intended to be guarded against is the Frauds and Disappointments suffered by Creditors, through the Contrivance of apparent Heirs, to their Prejudice, after the Decease of their Debtors. This is the only Evil that was in the View of the Legislature, and the only one that deserved to be taken under their Consideration. It is only after the Decease of the Debitor that the Influence of the apparent Heir over his Property begins to exert itself. He has then by his Apparency the sole Title of Possession; and the Legislature intended to prevent his making a bad Use of this Title, by assuming the Possession upon his Apparency, to the Exclusion of the Creditors.

As this was the only Evil meant to be redressed, it will not be presumed that the Remedy went beyond it, when there are no Words in the Statute that in a proper Sense will admit of that Construction. When the Debitor is alive, his eldest Son or presumptive Heir has no Title to possess his Estate, more than any Stranger. As he is not the Person against whom the Creditors are to lead their Diligence, so he can use no Contrivance either to retard it, or to exclude them from taking Possession in pursuance thereof. If this

Period had been in the View of the Statute, it would have spoke of the Contrivances of Debtors, the only Parties who then can retard or frustrate the Creditor's Diligence. But as it speaks only of the Contrivances of apparent Heirs after the Debtor's Decease, it is plain it meant to regulate only such Deeds as are done by them after that Period, till which indeed they cannot properly come under the Description in the Statute.

And accordingly there is no Instance through the whole Statute, though it contains a great Number of different Enactments, and *apparent Heirs* are mentioned in every one of them, as the Regulation of their Deeds make the chief Subject of the Statute; yet there is no Instance where that Description is taken in the improper Sense now urged by the Pursuer, to denude an eldest Son during the Life of his Father, or a younger Brother during the Life of his elder Brother, during which Time they cannot be said to have any Apparency, though they may have a presumptive Expectancy of Succession, but such as is liable to be defeated by obvious Events, so as it may never actually devolve to them.

And there is surely the less Reason to extend these Words in this Clause to a Sense that is no ways authorised by the Statute, nor in proper Language, that the Sanction here enacted is severe beyond any Example. It is not contented with taking away any Benefit the apparent Heir might make by the Acquisition, but it condemns him in an *universal Representation* of his Predecessor, which may very probably infer a total Forfeiture of his own Estate. Such Sanctions of the Legislature must be submitted to, because they are always introduced for salutary Purposes; but they will not be presumed to be couched under ambiguous Words, nor extended beyond the proper Meaning in which the Words are constantly taken throughout the Statute, and beyond the declared Intent of the Legislature therein expressed.

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Even in other Clauses of this *correctory Statute*, which are not attended with so severe Consequences, your Lordships are always in use to adhere to the strictest Interpretation of the Words. In the first Clause, which makes the Heir passing by liable only *in valorem* to Creditors who had Reason to trust a former Heir upon a continued Possession, your Lordships have not only restricted the general Words *Debts and Deeds* to such as are strictly onerous, but you have also refused to extend the Rule to Cases where the apparent Heir possesses the Estate without a Title; though this may put it in his Power by his voluntary Act to frustrate the Statute, and these Constructions have been authorised in their last Resort. If then this correctory Statute is not to be extended beyond the strictest Meaning of the Words, even in a Clause that is *not penal*, and where the Design of the Act seems to go along with the Extension; it will not be easy to persuade your Lordships to extend another Clause that is so highly *penal* beyond the *Purview* expressed in the Statute, and the *constant Meaning* in which the Words are uniformly taken throughout all the other Clauses. And,

3thio, Your Lordships are intreated to consider the Consequences that would result from such Extension of this penal Clause. If a Son, or a younger Brother, happens by any Accident, as may frequently happen, to be Creditor to his Father or his elder Brother, and does Diligence against their Lands, and enters into Possession for Payment of his Debt, then by this Construction, which extends the Clause to Possession attained during the Predecessor's Life, this Creditor, who had no other Intention but to get Payment of this Debt, will be subjected universally to the whole Debts of his Father or Brother, not only such as they have then contracted, but also what they may thereafter contract at any Time in their Life.

Again, Nothing is more common than for Proprietors of Land Estates to dispoise a Part of their Lands to their eldest Sons, when they come to be of Age, or when they enter
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into Marriage. If the Father was not incumbered with Debts at the Time, the Son has by such Deeds been hitherto thought secure against his future Contractions. But, by the Construction now pleaded, the Son, by entering to possess, though during his *Father's Life*, is subjected to an *universal Representation*, and liable for all his *Debts and Deeds* in the same Manner as if he *served Heir* to him after his Decease. These Things are extremely new, but they seem to be the Consequence of the Construction here pleaded by the Pursuer.

What the Pursuer chiefly insisted on was, "That *apparent Heir*, in the common Meaning of the Word, is applied to a Son during his Father's Life as well as after his Death; That this Construction had been followed by your Lordships Predecessors in Questions which occurred on the Act of Parliament made in the Year 1661, *anent Debitor and Creditor*; and that it has been put on this Statute by two Decisions, *June 7th 1710, Watson contra Brown*, observed by *Forbes*; and *November 24th 1714, Thomas Mercer contra Robert Leith*, observed by President *Dalrymple*."

But the Argument, from the Propriety of the Words, shall be left with your Lordships on what has been already said. It does not appear to the Petitioner, that it can in any proper Sense be said, that an apparent Heir is entered into Possession of his Predecessor's Estate during his Life, or that such Act is to infer an universal Representation in all his Deeds, as much as if he had been then served Heir to him, which was impossible. These Things appear, with great Submission, to carry an Inconsistency which the Petitioner is not able to reconcile.

And as to the Construction of the Act 1661, it is well known to your Lordships, that the accurate Meaning of Words was not so much attended to at that Period, as it has been in after Times. Besides that, when Provisions were made by

by Statutes, which appeared to be founded in Justice and Reason, and could do no Hurt to any Mortal, the Judges were in Use, in those Days, to extend them even beyond any Meaning that the Words could possibly bear. Such was the Case in this Clause of the Act 1661. It declared, that if an apparent Heir should acquire Right to an *expired Comprising*, the Right should be redeemable from him in ten Years, on Payment of the Sum at which he had acquired it. The Court extended this to apparent Heirs who acquired Apprisings *within the Legal*, though it was clearly not within the Words, because the same Reason was thought to militate; and they also extended it to eldest Sons acquiring Diligences during their Father's Life. Such Decisions were not properly *Constructions* of the Statute, but rather *Extensions* of the Regulation to Cases *not expressed ex paritate rationis*, in the same Manner as the Roman Praetor was in use *supplere jus civili*. But your Lordships have never been in use to take such Liberty with the Statute 1695: You always refused to do it in Questions on the *first* Clause, even where the Intention of the Statute seemed to require it. It is still less to be expected, that without such Intention you will do it on the *second*, which is so highly penal and destructive to those who fall under the Sanction of it.

As to the Decisions referred to, the 1st in 1710, *Watson contra Brown*, is thus observed by the Collector: The Defender was found liable upon the Act 1695 to pay his Father's Bond "upon this Ground, That the Defender had "intromitted with the Mails and Duties of his Father's "Lands after his Decease, notwithstanding of a singular "Title of Intromission acquired by him in the Father's "Life." When the Son entered into Possession after his Father's Death, the Case fell within the Words of the Statute, though he had acquired the Title of Possession during his

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Life; because the Statute forbids an apparent Heir either *to enter to possess*, or *to purchase*, without *-serving Heir to his Predecessor*; and declares, that in either Case he shall be liable in a *passive Title*. In that Case he appears to have been liable upon the *first Alternative*; and though the Purchase during his Father's Life was not relevant, yet the other was sufficient to conclude him.

In the other Case observed by Lord President *Dalrymple*, November 24th 1714, *Thomas Mason*, as Creditor to *James Leith*, pursues *Robert Leith* his Son as representing him, by accepting of a Disposition from his Father to certain heretable Sums of Money, reserving the Father's Liferent. The Lords found the Son liable; and there was a very clear Ground for it, *viz. præceptio hereditatis*; though it happens that the Argument, as taken down in the Collection, proceeds chiefly upon the Act of Parliament 1695. Such Instances of Inaccuracy in collecting Reasonings and Arguments may frequently occur, though indeed very rarely in this Collection; but they cannot alter the Judgment, nor vary the Principle upon which it depends.

The Petitioner will not trouble your Lordships, to say any further upon the Construction of the Act 1695. She shall only add, That even if it could be supposed to ly with the Pursuer, she cannot see, that it would infer the Conclusion in the Interlocutor, that therefore her Adjudications must be reduced at his Instance. What was urged by the Pursuer on this Head was, "That as the Act 1695 subjected *William Taylor* universally in consequence of this Purchase, he could not rear up the Adjudications so purchased, to exclude even the personal Creditors of his Father; and as little can the Defender, *quæ utitur jure auctoris*: For so soon as the said Adjudications came into the Person of *William Taylor* the apparent Heir, he became both Debitor and Creditor, and the same were extinguished *confusione*."

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Your Petitioner, with great Submission, is at a Loss to discover upon what Principles this Extinction or *confusio* can take place. Her Husband, in the Year 1724, acquired an Adjudication that had been led against his Father in 1709, and compleated by Charter and Infeftment in 1713. He paid the Price with his own Money which he had earned by hard Labour; and the Expiry of the Legal was declared against his Father in 1725, before this Pursuer had done any Diligence upon his Debt. It is not easy to the Petitioner to conceive, how this Right of Property, coming into the Person of her Husband for onerous Causes, should *ipso facto* become extinguished. He could not at any Rate be liable to pay his Father's Debts before his Death; and therefore this *confusio*, the Pursuer supposes to have happened the Moment these Adjudications came into his Person, seems to be without all Foundation, as he was neither *Debitor* in his Father's Debts, nor indeed *Creditor* to him in any Sum that could be extinguished *confusione*; but had acquired Right, for a valuable Consideration, to a Property before established in another Creditor by legal Diligence.

And if the Supposition were to be carried further in favour of the Pursuer, and the Adjudication were to be considered as a Security subject to Redemption; and it were also supposed, that the Petitioner's Husband, by the Act of acquiring it, became *ipso facto* liable to all his Father's Debts contracted and to be contracted, which, with great Deference, passes the Petitioner's Comprehension; yet even that would not be sufficient to support the Conclusion now insisted on. If such a passive Title could be supposed to take place during the Life of the Father the principal Debtor, he would certainly be obliged to relieve his Son of the Debts for which he should be overtaken: And it is no good Objection against the Preference of a Creditor upon his Infeftment, That he is bound alongst with the common Debtor

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in the Obligation granted to the competing Creditor, who pleads upon a subsequent Infestment. So it was determined by this Court, *June 28th 1711*, Sir *William Baird* against Mr *Alexander Mortimer* and *Alexander Deuchar*. The Priority of the Infestment must determine the *real Preference*, which may be transmitted to *singular Successors*, leaving the competing Creditor to insist upon the *personal Obligation* as accords.

And accordingly nothing is more common, than for an apparent Heir to grant a Bond to a Trustee, upon which his Predecessor's Estate is adjudged; and the Adjudication being thereafter transmitted to the Heir, will be a good Title of Property in his Person, and may be transmitted by him as such, though he is the only Debtor in the Bond upon which the Adjudication is led.

And therefore this *Inference* drawn by the Pursuer, That if *William Taylor* was liable to his Father's Debts in terms of the Act 1695, therefore his Adjudications must be extinguished, appears to be no less erroneous than the *Premissa* on which it is founded. The Law is too careful of the Interest of singular Successors, to allow such Extinctions to take place: And therefore the passive Title in the Act 1695, if it did apply, could not hurt the Petitioner's Preference. At the same Time it is hoped, your Lordships will be satisfied that it does not apply to the Case.

May it therefore please your Lordships, to alter the Lord Ordinary's Interlocutor, and to repel the Reason of Reduction of the Petitioner's Adjudication founded upon the Act 1695, and to remit to his Lordship to proceed accordingly.

According to Justice, &c.

JAMES FERGUSON.